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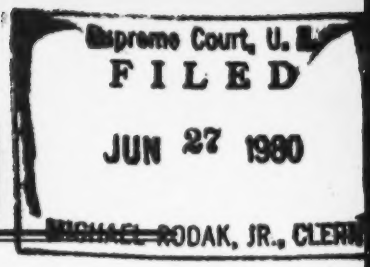


IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

RONALD TED ALSOBROOK
Petitioner,
v.
UNITED STATES OF AMERICA
Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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OCTOBER TERM, 1980

RONALD TED ALSOBROOK
Petitioner,
v.
UNITED STATES OF AMERICA
Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Ronald Ted Alsobrook, by and through his attorney, Neil H. Fink, petitions herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit affirming his conviction for violation of the Travel Act, 18 USC § 1952, filed May 22, 1980.

## QUESTION PRESENTED

Was Count I of the Indictment vague and ambiguous and was Defendant denied his right to be sufficiently informed of the nature of the charges against him and his right to be tried on the charges laid by the Grand Jury where, by the government's interpretation, Count I charged a continuing course of conduct in violation of the Travel Act and where the Court, adopting that interpretation, instructed the jury that it must convict the defendant if it found that the defendant traveled in interstate commerce with specific intent of promoting, managing, establishing or carrying on unlawful activity on either of the two dates specified in the Indictment.

## OPINION BELOW

The Opinion of the Sixth Circuit Court of Appeals filed May 22, 1980, affirming Petitioner's conviction, is reprinted in full as Appendix A hereto. That Opinion has not, as of this writing, been published.

## JURISDICTION

The Opinion and Order appealed from was filed May 22, 1980. The jurisdiction of this court is invoked under 28 USC § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,

> except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## STATUTORY PROVISION INVOLVED

United States Code, Title 18, Section 1952:

The Travel Act, 18 U.S.C. § 1952, provides:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —
>
> (1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act),or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

## STATEMENT OF THE CASE

Petitioner, Ronald Ted Alsobrook, was charged in Count One of a two count Indictment with traveling in interstate commerce with the specific intent of promoting a business enterprise involving gambling in

violation of the laws of the State of Michigan. Count I of the Indictment sets forth the charge as follows:

> 1. That on or about September 1, 1977, and continuously thereafter up to and including the date of the filing of this Indictment, in the Eastern District of Michigan and elsewhere, the Defendant RONALD TED ALSOBROOK a/k/a "Ron," willfully and knowingly did travel in interstate commerce between the State of California and the State of Michigan with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely: a business enterprise involving bookmaking, gambling, betting and wagering on sporting events in violation of Michigan Compiled Laws, Sections 750.301, 750.304, 750.314, 750.157A, 750.167 and 750.92 and thereafter did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity.
>
> 2. It is further alleged that the Defendant, RONALD TED ALSOBROOK a/k/a "Ron," as part of and in willful promotion of said unlawful activity, did:
>
> a. On or about October 28, 1977 travel by air from San Francisco, California to Detroit, Michigan.
>
> b. On or about October 31, 1977 travel by air from Detroit, Michigan to Los Angeles, California.

c. On or about November 7, 1977 travel by air from Detroit, Michigan to Los Angeles, California.

d. On or about November 14, 1977 travel by air from Detroit, Michigan to Los Angeles, California.

e. On or about December 8, 1977 travel by air from Los Angeles, California to Detroit, Michigan.

f. On or about December 12, 1977 travel by air from Detroit, Michigan to Los Angeles, California.

All in violation of Title 18, United States Code, Section 1952.

Prior to trial Petitioner moved to strike the words "and continuously thereafter up to and including the date of the filing of this Indictment" as surplusage. This motion was based on Defendant's interpretation of the Indictment charging that the violation of the Travel Act occurred on or about the date of September 1, 1977. The government thereafter responded that it would attempt to approve a separate Travel Act violation on each of the six dates set out in paragraph two of Count I. Petitioner challenged this interpretation in subsequent pleadings, further raising questions of duplicity, amendment of a grand jury indictment and vagueness — problems inherent in the government's interpretation of the Indictment. The trial court, ruling from the bench, denied Petitioner's challenge to the sufficiency of the Indictment on all grounds noted above.

At trial, the government generally established the existence of a bookmaking operation in Michigan

through records seized from Petitioner's office in Michigan, along with testimony of gambling customers and analysis by an expert witness. At the conclusion of the government's case, Petitioner moved for a Judgment of Acquittal based on the government's failure to produce any evidence of the fact that the October 28, 1977 act of travel charged in paragraph two of the Indictment originated in San Francisco as alleged, and that the government failed to present evidence of the requisite intent as to the other dates of travel charged. The Motion For Judgment of Acquittal was denied. Petitioner also argued that the variance between the charge (alleging travel on October 28, 1977 originating in San Francisco) and the absence of proof as to San Francisco, created an improper amendment to the Indictment and, therefore, moved to strike the October 28, 1977 travel along with the other dates of travel set out in paragraph two. The government conceded that the October 28, 1977 and December 8, 1977 dates were the only dates for which they could show the necessary element of subsequent acts in furtherance of the unlawful activity and that four of the dates in paragraph two should be deleted from the original Indictment. Thus the acts of travel alleged on October 21, November 7, November 14 and November 12, 1977 were striken. Petitioner renewed his previous motion for an election of acts; this motion was denied.

The final version of the Indictment as presented to the jury remained unchanged as to paragraph one; paragraph two charged as follows:

> 1. The Grand Jury charges in Count One that on or about September 1, 1977, and continuously thereafter up to and including the date of the

> filing of this Indictment, in the Eastern District of Michigan and elsewhere, the Defendant, RONALD TED ALSOBROOK, a/k/a "Ron" willfully and knowingly did travel in interstate commerce between the State of California and the State of Michigan with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely: a business enterprise involving bookmaking, gambling, betting and wagering on sporting events in violation of Michigan Compiled Laws, Sections 750.301, 750.304, 750.314, 750.157a, 750.167 and 750.92, and thereafter did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity.
>
> 2. It is further alleged that the defendant, RONALD TED ALSOBROOK, a/k/a "Ron," as part of and in willful participation of said unlawful activity, did:
>
> a. On or about October 28, 1977 travel by air from San Francisco, California to Detroit, Michigan.
>
> b. On or about December 8, 1977, travel by air from Los Angeles, California to Detroit, Michigan.

As to the dates specified in the Indictment, the Court instructed the jury only as to those dates identified in paragraph two:

> [Y]ou will note that the Indictment charges two dates of such travel — October 28, 1977 and December 8, 1977. You must all agree; that is,

> with unanimity, that defendant Alsobrook traveled in interstate commerce with the specific intent of promoting, managing, establishing or carrying on an unlawful activity on at least one of the two dates in order to find him guilty. By contrast, if you cannot conclude with unanimity that the Defendant Alsobrook traveled in interstate commerce with a specific intent of promoting, managing, establishing or carrying on an unlawful activity on at least one of the two specific dates, you must return a verdict of not guilty.

No instruction was given as to the September 1, 1977 date specified in paragraph one of the Count I of the Indictment.

## REASONS FOR GRANTING THE WRIT

### THE DECISION BELOW SIGNIFICANTLY UNDERCUTS DEFENDANT'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO BE TRIED ONLY UPON CHARGES LAID BY THE GRAND JURY AND TO BE INFORMED OF THE NATURE OF THE CHARGES AGAINST HIM.

The essential elements of the offense charged in this Indictment, to-wit, 18 USC § 1952, are as follows:

> 1. That the Defendant, at or about the time charged in the Indictment, traveled in interstate commerce.
>
> 2. That the travel was done with a specific intent to further some unlawful activity, to-wit: to promote, manage, establish, carry on or facilitate a gambling operation, in violation of the laws of the State of Michigan.

> 3. The Defendant following such travel attempted to or did in fact promote, manage, establish, carry on or facilitate a gambling operation in violation of the laws of the State of Michigan. See Devitt & Blackmar, *Federal Jury Practice and Instruction*, Section 56.13. *United States v Stagman*, 446 F2d 489 (6th Cir, 1971); *United States v Gebhart*, 411 F2d 1261 (6th Cir, 1971).

Although the legislative history of the Travel Act discloses Congress' clear intention to require a continuing course of illegal activity, in violation of State law, (Element 3), it has been recognized that each act of travel itself (Element 1) is the unit of prosecution and that each act of travel is a separate offense. *United States v Polizzi*, 500 F2d 856 (9th Cir, 1974), *cert denied*, 419 US 1120 (1975); *United States v Teemer*, 214 F Supp 952, (N.D. W.Va., 1963). *United States v Isaacs*, 347 F Supp 743, 757 (N.D. Ill., 1972); *United States v Cirpolo*, 288 F Supp 903, 1022 (NJ, 1968) reversed on other grounds 450 F2d 424 (3rd Cir, 1971). *See also, Sagansky v United States*, 358 F2d 195, 201 (1st Cir, 1966); *Katz v United States*, 369 F2d 130, 135 (9th Cir, 1966); *Cohen v United States*, 378 F2d 751, 755 (9th Cir, 1967); *Mitchell v United States*, 142 F2d 480, 481 (10th Cir, 1944).

Against this background, Count 1 must be construed as charging one Travel Act violation occurring on or about September 1, 1977 as set forth in paragraph one. This conclusion is inescapable not only in accordance with the expectation that the Indictment is a proper pleading which charges only one offense in each count, but also since the second and third required elements of the Travel Act (intent and acts in furtherance of the

unlawful activity) are not set forth at all with reference to the dates alleged in paragraph two. Thus, it clearly appears that the dates of travel specified in paragraph two were intended by the grand jury to represent only the means by which the unlawful activity was carried on.

Nevertheless, the trial court's denial of defense motions and its instructions to the jury was based on an interpretation of the Indictment which fundamentally altered the charges laid by the grand jury. Wholly ignoring the September 1, 1977 date, the judge viewed each of the dates specified in paragraph two as a predicate for a Travel Act violation, subjecting the Defendant to the possibility of a conviction for any one of six separate offenses.

The Sixth Circuit Court of Appeals affirmed the trial court's interpretation, holding that Count 1 charged a continuing course of conduct and that this manner of charging, that is, the consolidation of several acts into a single scheme, benefitted rather than prejudiced Petitioner. (Appendix p. 20-21. Slip Op at p.4-5)

The courts below ignore, in those rulings, the fundamental guarantee of grand jury presentment.

The essence of the Fifth Amendment's guarantee of prosecution by Indictment is that the charges against which an accused must defend is truly the charge of a Grand Jury. *Gaither v United States*, 413 F2d 1061 (DC Cir, 1969); *Stirone v United States*, 361 US 212 (1960); *Ex Parte Bain*, 121 US 1 (1887). A defendant may only be tried on or convicted of the charge laid by the indicting grand jury. Failure to follow the intendment of the indicting grand jury results in a constructive

amendment where, as here, the trial court significantly altered the true nature of the charge.

In the case at bar, as Petitioner originally contended, the grand jury intended to charge that a Travel Act violation occurred on September 1, 1977 with the acts in paragraph two setting forth the means by which the unlawful activity was carried out, and in so charging, the grand jury properly interpreted the statute.

The correctness of this reading of the Indictment is supported by reference to the evidence submitted at trial relative to the six dates of travel specified in paragraph two. As the Court of Appeals noted, four of these dates represent travel from Michigan to California (Appendix p. 20; Slip Op. at p. 4); they could not, therefore, stand as the predicate act of travel since the government, as it conceded in its responses to Defendant's Motion for Judgment of Acquittal, had no proofs as to the necessary element of subsequent acts in furtherance of the unlawful activity. That they were, nevertheless, listed and identified in the Indictment in the same manner as the two dates finally submitted to the jury as the predicate acts of travel, by all principles of logical construction, supports the conclusion that the grand jury regarded each of these dates as having an identical relationship to the charge. Where, as necessarily follows from the interpretation of Count I adopted in the holdings below, two dates are abstracted from the list and identified as apples rather than oranges, the resulting interpretation destroys the logical and internally consistent theory presented by the natural order and clear language of the Indictment.

Petitioner contends that a Travel Act violation is properly plead only where each count of the Indictment charges a single act of travel in violation of 18 USC

§ 1952. The grand jury's Indictment here is a proper charge. The trial court, however, erred by construing the Indictment to charge a continuing offense. The trial court thus significantly amended the Indictment in violation of Petitioner's right under the Fifth Amendment to be tried on the exact charges laid by the grand jury.

The difficulty in determining the exact nature of what was charged by the grand jury constitutes a separate though related attack on the vagueness and insufficiency of Indictment.

Prior to trial, Petitioner filed three separate pleadings in his effort to clarify the exact nature of the charges he faced; the government filed two separate responses: Defendant's Motion to Strike Surplusage; Government's Response to Defendant's Motion to Strike; Defendant's Trial Brief and Reply to Government's Memorandum in Opposition to Motion to Strike; Government's Supplementary Response to Defendant's Motion to Strike or in the Alternative to Force the Government to an Election of Acts; Defendant's Supplemental Memorandum.[1]

Despite this ongoing dispute between the prosecution and the defense as to the nature of the charge alleged by the grand jury in Count 1, the trial court did not rule

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[1] A Bill of Particulars was requested by defense counsel by motion filed on November 9, 1978 wherein the government was specifically asked to state: (1) the method and means of interstate commerce in which the Petitioner was alleged to have traveled on or about September 1, 1977, *with intent to promote an unlawful activity*, and; (2) the method and means of interstate travel in which Petitioner was alleged to have traveled *as part of an illegal activity* on the dates specified in paragraph two of Count 1. This request was denied by the Court on April 24, 1979.

on the motions until the first day of trial. At that time, the court adopted the government's interpretation of the charge. As noted above, the prosecution originally asserted that it would attempt to establish six distinct Travel Act violations based on the dates set forth in paragraph two of the Indictment. Defense counsel continued throughout the trial to challenge this interpretation, particularly when it became apparent that four of the acts of travel alleged were to be striken from the original Indictment upon the prosecution's concession that it could not prove the neccessary elements of a Travel Act violation on those dates — a result seemingly consistent with defense counsel's theory of the case and inconsistent with the government's initial posture as to the nature of the charge.

The holding of the Sixth Circuit addresses itself only to the construction of Count 1. In so doing, that opinion fails to respond to Petitioner's assertion that where the language of the charging portion of an Indictment is so unclear that an accused must guess at its meaning, he is denied his fundamental right to be informed of the nature of the charges against him.

The basic purpose of an indictment "is to clearly apprise the defendant of the charges and what he must be prepared to meet." *United States v Tye*, 519 F2d 586, 589 (10th Cir, 1975), *cert denied*, 423 US 989, (1976). Accordingly, if the "indictment leaves the defendant in a fair doubt as to the offense charged, it fails to meet the test that the indictment must be free from all ambiguity" and "leave no doubt in the minds of the accused and the court of the exact offense intended to be charged." *Evans v United States*,

153 US 584, 587, 14 S Ct 934, 38 L Ed 830 (1894); *Bratton v United States*, 73 F2d 795, 797 (10th Cir, 1934); *Rumely v United States*, 293 F 532, 547 (2d Cir, 1923), *cert denied*, 263 US 713, (1923). 44 S Ct 38, 68 L Ed 520 (1923).

Rule 7(c) of the Federal Rules of Criminal Procedure provides in pertinent part, that "[t]he Indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." This rule reflects the oft-stated principle "that an indictment is defective if it fails to apprise the accused with reasonable certainty of the nature of the accusation against him." *United States v Zeehandelaar*, 498 F2d 352, 356 (2d Cir, 1974) (Citations omitted).

Consequently, your Petitioner was entitled to know the exact charge he must face. If the government and the courts below are correct as to what the grand jury charged, then the ambiguities and defects contained in the Indictment rendered it vague, and insufficient to inform the accused of the charges. The Indictment was further insufficient, under that construction, in that it failed to set forth all of the elements of a § 1952 violation as to the separate acts of travel (offenses) alleged. Petitioner has been, therefore, denied the constitutional protections afforded every accused by the Fifth and Sixth Amendments, and cannot said to have been fairly tried.

## CONCLUSION

For these reasons the Court should issue a Writ of Certiorari to the Sixth Circuit Court of Appeals, that it might review the substantial question herein posed.

Respectfully submitted,

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Dated: June 19, 1980

Nos. 79-5226, 79-5227

# UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

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| | |
|---|---|
| UNITED STATES OF AMERICA,<br>*Plaintiff-Appellee,*<br>v.<br>RONALD TED ALSOBROOK and GEORGE ALVIN ROLLS,<br>*Defendants-Appellants.* | APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division. |

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Decided and Filed May 22, 1980.

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Before: EDWARDS, Chief Judge, CELEBREZZE and BROWN, Circuit Judges.

BAILEY BROWN, Circuit Judge. The defendant, Ronald Alsobrook, was convicted of traveling in interstate commerce with the intent to carry on an unlawful gambling activity in violation of the Travel Act, 18 U.S.C. § 1952. The defendant, George Rolls, was convicted under 18 U.S.C. § 2 of aiding and abetting Alsobrook. Both defendants appeal.

## I

The evidence introduced at the defendants' trial, viewed in the light most favorable to the government, established the following facts. Throughout the fall of 1977, Alsobrook operated an illegal bookmaking business in Michigan. Sometime prior to October, 1977, however, Alsobrook moved at

least part of his family from Michigan to California so that his daughter, an excellent swimmer, could train for the 1980 Olympics.

On October 28, 1977, FBI agents observed Alsobrook being picked up at the Detroit airport by a friend in a car that, subsequent investigation revealed, was rented by Rolls. Alsobrook registered at a local hotel where he listed his residence as Mission Viejo, California. After conducting his bookmaking operation and using this car leased by Rolls over the weekend, he was driven to the airport in it on Monday, October 31. Alsobrook was subsequently seen boarding a flight leaving Detroit.

On December 8, 1977, FBI agents in Los Angeles observed Alsobrook boarding a flight bound for Detroit. Upon his arrival in Detroit, Alsobrook followed the same routine that he established in October. He was picked up at the airport in the car rented by Rolls, registered at the hotel as a resident of California, operated his bookmaking business over the weekend and then was dropped off at the airport in the car rented by Rolls.

Additional proof was introduced showing a pattern of travel by Alsobrook from California to Michigan and then returning to California. Several airline tickets reflected these weekend trips. On each occasion, Alsobrook followed the same routine once he reached Detroit.

The exact role of Rolls in the gambling operation was never clearly established. Several witnesses, however, testified that they had placed bets with either Alsobrook or Rolls in the fall of 1977 and that one of the defendants, not necessarily the one who had initially accepted the bet, had subsequently collected or paid the bet. Moreover, telephone records indicated that Alsobrook called Rolls on several occasions during his visits to Michigan. Rolls never personally met Alsobrook at the airport, but on each of his visits, as stated, Alsobrook was picked up in a car rented by Rolls.

From this evidence, the jury could have reasonably concluded that Alsobrook traveled in interstate commerce on October 28 and December 8 with the intent to conduct an illegal bookmaking operation in Michigan and that he subsequently operated that bookmaking enterprise.[1] In addition, on the basis of Rolls' connections with the bookmaking operation and the use of the car leased to him by Alsobrook, the jury could have reasonably concluded that Rolls had knowledge of the interstate travel by Alsobrook[2] and that he acted to facilitate that interstate travel. Accordingly, we believe that the evidence introduced at the defendants' trial was sufficient to sustain the convictions of both defendants, absent some prejudicial error in the rulings of the district court. Alsobrook and Rolls have raised different issues in challenging those rulings.

## II

Alsobrook contends that the indictment was duplicitous and therefore invalid. The indictment consisted of a single count charging a violation of the Travel Act. The count contained two paragraphs. The first paragraph alleged that "on or about September 1, 1977, and continuously thereafter," Alsobrook traveled in interstate commerce with the intent to aid unlawful gambling activity. The second paragraph listed six dates on which Alsobrook allegedly traveled between Cali-

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[1] The principal defense of Alsobrook at his trial was that he remained a resident of Michigan throughout the fall of 1977 and that therefore his travel from California to Michigan was for the purpose of returning home. On this basis, Alsobrook contended that he did not travel with the intent to promote an illegal business enterprise. We believe that there was sufficient evidence from which the jury could have concluded that Alsobrook stayed primarily in California and flew to Michigan on weekends to conduct his bookmaking operation. Under these circumstances, the legal residence of Alsobrook would appear irrelevant.

[2] We discuss, *infra*, the necessity of proving actual knowledge by Rolls.

fornia and Michigan "as part of and in willful promotion of said unlawful activity."[3]

Our initial problem is one of construction. Alsobrook maintains that the indictment should be construed to allege a single act of interstate travel that occurred "on or about September 1, 1977." While some of the language in the indictment supports such an interpretation, the fairer interpretation of the indictment is that it alleges a continuing course of interstate travel consisting of the specific travel dates listed in the second paragraph of the indictment. Construed in this manner, the critical issue is whether the inclusion of more than one act of interstate travel in a single count rendered the indictment duplicitous.

Under the Travel Act, each act of interstate travel and each use of an interstate facility constitutes a punishable offense. *United States* v. *Polizzi*, 500 F.2d 856, 898 (9th Cir. 1974). Thus, the grand jury could have indicted Alsobrook in separate counts for each of his trips to Michigan. If the prosecution had drafted the indictment in this manner, Alsobrook would have been exposed to the possibility of a more severe penalty. Instead, however, the prosecution elected to characterize the actions of Alsobrook as a continuing course of conduct that represented only a single offense.

Several courts have upheld the validity of indictments that consolidate several acts into a single count when such acts represent a single, continuing scheme that occurred within a short period of time and that involved the same defendant. *See United States* v. *Girard*, 601 F.2d 69 (2nd Cir. 1979); *United States* v. *Pavloski*, 574 F.2d 933 (7th Cir. 1978); *Cohen* v. *United States*, 378 F.2d 751 (9th Cir.), *cert. denied*, 389 U.S. 897 (1967). The determination of whether a group

[3] Four of these travel dates involved trips from Michigan to California. These dates were stricken from the indictment at the conclusion of the proof for the reason that the government had failed to show any acts by Alsobrook while in California that furthered any unlawful activity.

of acts represents a single, continuing scheme or a set of separate and distinct offenses is a difficult one that must be left at least initially to the discretion of the prosecution. This discretion, however, is not without limits. *See e.g., United States* v. *Tanner*, 471 F.2d 128 (7th Cir. 1972). Ultimately, the indictment must be measured in terms of whether it exposes the defendant to any of the inherent dangers of a duplicitous indictment. *See United States* v. *Pavloski, supra*. Those dangers include the possibility that the defendant may not be properly notified of the charges against him, that he may be subjected to double jeopardy, that he may be prejudiced by evidentiary rulings during the trial, and that he may be convicted by a less than unanimous verdict. If any of these dangers are present, the acts of the defendant should be separated into different counts even though they may represent a single, continuing scheme.

In this case, we believe that the government's characterization of the facts as a single, continuous scheme was a fair one. Moreover, none of the dangers of duplicity were present in this case. The government's theory of prosecution was sufficiently clear to provide adequate notice of the charges against Alsobrook and to preclude any potential for double jeopardy. The indictment did not create any evidentiary problems as a result of the single court. Finally, the district court, by instructing the jury that it must reach a unanimous decision on at least one act of interstate travel, obviated any possibility of a conviction based on a less than unanimous verdict.

Accordingly, we conclude that the indictment in this case was neither duplicitous nor otherwise prejudicial. We find it difficult to criticize the government's exercise of discretion when it redounds to the benefit of the defendant as it did in this case. More importantly, however, we are hesitant to create an inflexible rule that would force the government to charge each punishable act as a separate count and thereby to cumulate both offenses and possible punishments.

We have considered the remaining issues raised by Alsobrook and find them without merit. We therefore affirm the conviction of Alsobrook.

## III

Rolls contends that the district court erred in instructing the jury that it could find Rolls guilty as an aider and abettor if "he knew or should reasonably have known that Ronald Alsobrook was engaged in interstate movement or using a facility in interstate commerce." Rolls maintains that the government was required to prove that he had actual knowledge of Alsobrook's interstate travel.

The Travel Act was originally enacted to provide a means by which the federal government could aid state officials in controlling organized crime. It was directed specifically at members of organized crime who resided in one state and operated illegal enterprises in other states. *See United States* v. *Nardello*, 393 U.S. 286 (1969). Despite this narrow purpose, however, the language of the Travel Act is quite broad.[4]

---

[4] The Travel Act, 18 U.S.C. § 1952, provides:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act, or prostitution offenses in violation of the laws of the State in which they are committed or of the United

*See United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973). In *Rewis* v. *United States*, 401 U.S. 808 (1971), the Supreme Court warned "that an expansive Travel Act would alter sensitive federal-state relationships." 401 U.S. at 812. On that basis, the Court held that interstate travel by customers of a gambling enterprise, even though reasonably foreseeable, was not sufficient to trigger the provisions of the Travel Act. But even after *Rewis*, the precise scope of the Travel Act remains in many respects undefined.[5]

The majority of the circuits have held that knowledge by a defendant of the interstate travel or of the use of an interstate facility by another is not an element of a violation of the Travel Act. *See United States* v. *McPartlin*, 595 F.2d 1321, 1361 (7th Cir. 1979), *United States* v. *Perrin*, 580 F.2d 730, 737 (5th Cir. 1978); *United States* v. *Villano*, 529 F.2d 1046, 1054 (10th Cir. 1976); *United States* v. *LeFaivre*, 507 F.2d 1288, 1298 (4th Cir. 1974); *United States* v. *Sellaro*, 514 F.2d 114, 120 (8th Cir. 1973); *United States* v. *Roselli*, 432 F.2d 879, 891 (9th Cir. 1970). These circuits therefore hold that all of the persons involved in an illegal business enterprise may be prosecuted under the Travel Act if any one of them travels in interstate commerce or uses an interstate facility. The Sixth Circuit, however, has adopted a more narrow interpretation of the Travel Act.

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States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

[5] The Seventh and Second Circuits have held that the Travel Act does not extend to those uses of interstate facilities that are minimal and incidental to the operation of the illegal business. *United States* v. *Herrera*, 584 F.2d 1137 (2nd Cir. 1978); *United States* v. *Archer*, 486 F.2d 670 (2nd Cir. 1973); *United States* v. *Altobella*, 442 F.2d 310 (7th Cir. 1971). This court, as well as the Fourth Circuit, has rejected this construction of the Act. *United States* v. *Eisner*, 533 F.2d 987 (6th Cir. 1976); *United States* v. *LeFaivre*, 507 F.2d 1288 (4th Cir. 1974).

On two separate occasions, in *United States* v. *Barnes*, 383 F.2d 287 (6th Cir. 1967), and in *United States* v. *Prince*, 529 F.2d 1108 (6th Cir. 1976), this court has reversed convictions under the Travel Act for the reason that the proof was insufficient to demonstrate that the defendant knew that another person involved in the illegal business enterprise was traveling in interstate commerce or was using interstate facilities. In both cases, it is true, the court employed language to the effect that the proof failed to show that the defendant "knew or reasonably should have known" of interstate travel or of the use of interstate facilities. We conclude, however, that under the law of this circuit as established by *Barnes* and *Prince*, it was necessary for a conviction of Rolls that the jury find beyond a reasonable doubt that Rolls had actual knowledge of Alsobrook's interstate travel. Even so, we believe that the charge was sufficient, though it would have been better to have charged that actual knowledge was necessary but that if the jury concluded from all the facts and circumstances that Rolls reasonably should have had such knowledge, it could conclude that he did have such knowledge. In any case, in view of the strength of the government's proof as to the knowledge of Rolls that Alsobrook was traveling in interstate commerce, the alleged error in the charge was harmless.

The convictions of defendant Alsobrook in No. 79-5226 and defendant Rolls in No. 79-5227 are affirmed.